UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

JERRY ADKINS, et. al. Plaintiffs, v. KENNETH R. WILL, VIM RECYCLING, INC., and K.C. INDUSTRIES, LLC. Defendants.	)	CAUSE NO. 3:09-CV-00510

PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, JERRY ADKINS, et. al., by counsel, hereby reply to Defendants' Response to Plaintiffs' Motion for Preliminary Injunction as follows:

I. Defendants' Administrative Challenges to IDEM Decisions Regarding the "C" Waste Pile are Irrelevant to Plaintiffs' RCRA Claims

Defendant, Kenneth R. Will, has a long history of blaming circumstances outside of his control for causing VIM's operations to be out of compliance with applicable environmental laws and regulations.[1] In an attempt to confuse the issues presented for this Court's consideration, Defendant Will now blames such circumstances to explain why VIM could not meet IDEM's September 30, 2008 deadline to remove the "C" pile.[2] However, Defendants' administrative quarrels[3] with IDEM over

1 *See e.g.* **Plaintiffs' Exhibit 1:** Keith Benman*, Recycling Firm Struggles with Pollution,* Elkhart Truth (Nov. 5, 1999) (reporting that Defendant Will blamed lack of space at VIM's Goshen facility for his failure to move wood grinding operations indoors as ordered by IDEM in 1995 but viewed "the opening of [VIM's] Elkhart facility as the long-term solution to [VIM's] problems.")

2 **Defendants' Exhibit A** to Defs' Response Brief: Affidavit of Ken Will, ¶¶ 4, 7, 14, 19 (claiming that in "2003, VIM installed a new indoor wood processing system while also receiving an influx of materials from the mobile home and recreational vehicle industry. Because VIM's indoor wood processing system did not perform as specified by the turnkey vendor which sold the system to VIM, it was unable to process all of the materials" referred to by IDEM as "C" waste. "During negotiations with IDEM [to address the "C" pile, Ken Will] was not represented by an attorney.""Despite [Ken Will's] continued discussion with IDEM about how to obtain a marketing and distribution permit, VIM experienced a fire on its property." In January, 2009, after the September 30, 2008 deadline, Ken Will explored disposal of "C" waste with the Elkhart County landfill but was refused due to fire and liability concerns).

3 *See* Defs' Resp. to Pltfs' Motion for Preliminary Injunction, p. 5-6 (referring to administrative proceedings before the Indiana Office of Environmental Adjudication wherein Defendants are challenging IDEM's denial of their request for more time to dispose of the "C" pile and IDEM's denial of a Marketing & Distribution permit to VIM.)

removal and disposal of the "C" waste pile that is the subject of IDEM's Agreed Order ("AO") of January, 2007, have absolutely nothing to do with Plaintiffs' RCRA claims or whether Plaintiffs will be able to demonstrate a likelihood of success on the merits of those claims.

As discussed in detail in Plaintiffs' Motion for Preliminary Injunction and Plaintiffs' Brief in Opposition to Defendants' Amended Motion to Dismiss, Plaintiffs' RCRA claims in Count I of their Verified Complaint, do not seek enforcement of Defendants' solid waste violations that are the subject of IDEM's January 2007 AO.[4] Also discussed fully in Plaintiffs' prior briefs, the RCRA claims set forth in both Counts I and II, do not seek removal of the specifically delineated "C" waste pile at issue in the January 2007 AO.[5] Accordingly, Defendant Will's dispute with IDEM over the proper interpretation of the terms of the January 2007 AO, whether IDEM was wrong to deny Defendant's request for more time to remove the "C" waste pile at issue in the January 2007 AO, or whether IDEM was wrong to deny Defendant's application for a Marketing & Distribution permit to make a "useful product" out of the "C" waste at issue in the January 2007 AO, are issues wholly unrelated to Plaintiffs' RCRA claims and should be disregarded by this Court in deciding Plaintiffs' request for a preliminary injunction.

II. Open Dumping is Not the Only RCRA Issue in this Case

Defendants urge this Court to ignore Counts I and II of Plaintiffs' Verified Complaint and find that the only RCRA "issue in this case is open dumping.[6]" As discussed fully in Plaintiffs' Brief in Response to Defendants' Amended Motion to Dismiss, Indiana's solid waste management laws have "become effective pursuant to RCRA" and are, therefore, subject to citizen enforcement under 42 U.S.C. § 6972(a)(1)(A).[7] *Ashoff v. City of Ukiah,* 130 F.3d 409, 411 (9th Cir. 1997) ("If a state standard becomes effective pursuant to RCRA, a citizen can sue in federal court to enforce the [state] standard").

4 Plaintiffs' Motion for Preliminary Injunction, pp. 22-24; Plaintiffs' Brief in Opposition to Defendants' Amended Motion to Dismiss, pp. 9-11.
5 *Id.*
6 Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction at 8.
7 Plaintiffs' Brief in Response to Defendants' Amended Motion to Dismiss at 9.

Count I of Plaintiffs' Verified Complaint contains seventeen (17) allegations as to Defendants' continued violations of "standards, regulations, conditions, requirements, prohibitions and/or orders which have become effective pursuant to RCRA, including Indiana's solid waste management regulations.[8]" In support of those allegations, Plaintiffs plead fifty-six (56) factual allegations detailing the numerous instances where IDEM reported Defendants' violations of Indiana's solid waste management laws, including open dumping, but took no action to enforce those violations.[9]

For example, in paragraphs 129 through 134, Plaintiffs detail what happened after IDEM filed its Petition for Civil Enforcement against Defendant VIM to enforce the terms of the January, 2007 AO, including: on December 17, 2008, IDEM noted that it had relayed to Defendants in previous meetings that "processing 'B' waste requires the issuance of a Solid Waste Processing Permit" but Defendants had not yet applied.[10] Despite this instruction, during inspections of Defendants' Elkhart site in March and April, 2009, IDEM found that Defendants were continuing to open dump "B" wastes at the site, and continuing to grind/process "B" wastes without a solid waste processing permit.[11] During site inspections in June, August, September and October, 2009, IDEM reported, among other solid waste violations, that Defendants continued to open dump "B" wastes at the Elkhart site, and process/grind "B" wastes without a solid waste processing permit.[12] Not one of these violations could have been or were the subject of IDEM's 2008 action to enforce the AO of January 2007. Nor were these violations in any way the subject of EPA's ACO which resolved Defendants' CAA violations of May 8, 2009.

In addition to alleging RCRA violations beyond open dumping, Plaintiffs' Verified Complaint in Count II seeks to abate the continued threat of harm to Plaintiffs' health and environment posed by Defendants' past and continued solid waste activities (regardless of whether those activities violate

8 Pltfs. Verified Complaint at ¶ 168(a)-(q).
9 *Id.* at ¶¶ 93-165.
10 *Id.* at ¶129.
11 *Id.* at ¶¶ 132, 134.
12 *Id.* at ¶¶ 137, 138, 141, 142, 143.

RCRA) not addressed by IDEM and/or EPA.[13] Unlike 42 U.S.C. § 6972(a)(1)(A), subsection (a)(1)(B), is more general, and "does not depend on any specific [RCRA] provision, nor is it superseded by a state program." *Dague v. Burlington,* 935 F.2d 1343, 1352 (2nd Cir. 1991) *rev'd on other grounds, Burlington v. Dague,* 976 F.2d 801 (2nd Cir. 1992). In support of their (a)(1)(B) claim, Plaintiffs plead fifteen (15) factual allegations detailing the harmful nature of Defendants' continued solid waste activities and operations at the Elkhart site that are not in any way addressed or remedied by IDEM or EPA.[14] Thus, Plaintiffs' "imminent and substantial endangerment" claim is, itself, a RCRA claim that alleges something other than open dumping.

Assuming *arguendo* that the only RCRA issue in this case is open dumping, Plaintiffs are likely to succeed on the merits of that issue in any event. Defendants' statement that "the purpose of RCRA isn't to regulate particulate matter or dust,[15]" is debatable and digressive given the Congressional finding on enacting RCRA that "open dumping is particularly harmful to health, contaminates drinking water . . ., and pollutes the air and the land." 42 U.S.C. § 6901(b)(4)(emphasis added). Accordingly, RCRA expressly prohibits "any solid waste management practice or disposal of solid waste . . . which constitutes the open dumping of solid waste." 42 U.S.C. § 6945(a). Not only is the act of "open dumping" prohibited, but the creation and continued existence of an "open dump" is forbidden by RCRA as well. *See* 42 U.S.C. § 6944(b) and 42 U.S.C. § 6943(a)(2) (requiring state solid waste management plans to prohibit the establishment of new open dumps); 42 U.S.C. § 6943(a)(3) (requiring state plans to provide for the closing or upgrading of all existing open dumps).

42 U.S.C. § 6903(14) defines an "open dump" as "any facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria promulgated under section 6944." Setting forth those criteria, 40 CFR § 257.3 states that "[s]olid waste disposal facilities or practices

13 *Id.* at ¶¶ 173-180 (asserting a claim under 42 U.S.C. § 6972(a)(1)(B)).
14 *Id.* at ¶¶ 150-165.
15 Defs' Response in Opposition to Pltfs' Motion for Preliminary Injunction at 8.

which violate . . . the criteria pose a reasonable probability of adverse effects on health or the environment." Of particular relevance, a "facility or practice" violates 40 CFR § 257.3 if:

> the on-site population of disease vectors is [not] minimized through the periodic application of cover material or other techniques as appropriate so as to protect public health; 40 CFR § 257.3-6
>
> the facility or practice . . . engage[s] in open burning of residential, commercial, institutional or industrial solid waste; 40 CFR § 257.3-7
>
> the facility or practice . . . pose[s] a hazard to the safety of persons or property from fires. 40 CFR § 257.3-8.

Implementing the foregoing provisions in Indiana, state regulations proscribe disposal of solid waste at an "open dump" defined as "the *consolidation* of solid waste from (1) or more sources or the disposal of solid waste at a single disposal site that: (1) does not fulfill the requirements of a sanitary landfill or other land disposal method as prescribed by law or regulations; and (2) is established and maintained (A) without cover; and (B) without regard to the possibilities of contamination of surface or subsurface water resources." 329 IAC 10-4-3; Ind. Code § 13-11-2-14; Ind. Code § 13-11-2-147 (emphasis added).

Here, Plaintiffs have alleged that Defendants created an open dump at its facility in Elkhart long before IDEM recognized it as such, and have been maintaining an open dump at that location to the present time.[16] In support, Plaintiffs have provided overwhelming evidence that Defendants have consolidated solid wastes from one or more sources at the Elkhart facility - a facility which clearly does not meet the requirements of a sanitary landfill and/or have disposed of solid wastes at the facility.[17] Moreover, Plaintiffs have alleged that Defendants have been open dumping "B" wastes since the beginning of operations to the present time despite multiple warnings by IDEM personnel, since at least

16 Pltfs' Verified Complaint, ¶¶ 99, 102, 104, 105, 106, 168(a)-(f).

17 *See* **Plaintiffs' Exhibits B, C, E, G, H, I, J, K, O, P, Q, R, S, T, U, W, X, Z** attached to Plaintiffs' Motion for Preliminary Injunction.

August of 2007, that doing so is not permitted.[18] In support, Plaintiffs submitted numerous IDEM inspection reports and violation notices with photographs depicting and describing Defendants' open dumping of "B" wastes.[19]

To prevail on their preliminary injunction motion, Plaintiffs must demonstrate only a "likelihood of success on the merits" of their claims, not that they definitely will succeed at trial. Thus, on the open dumping issue, contrary to Defendants' assertion that Plaintiffs "must show that VIM is . . . engaged in open dumping,[20]" Plaintiffs need only demonstrate they will likely succeed in showing that VIM established and continues to maintain an open dump and/or is engaged in open dumping. Plaintiffs have more than met their burden in this regard.

III. Defendants' Solid Waste Activities Constitute Irreparable Harm *Per Se*

Defendants argue that Plaintiffs cannot rely on the *"per se"* rule to demonstrate irreparable harm in this case because they "cannot prove an ongoing and current violation of open dumping laws since VIM is addressing the issues pursuant to previous state and agency actions.[21]" As discussed thoroughly above and in prior briefs, Defendants' open dumping is not the only violation of RCRA at issue in this case and, even on that issue, there is more than sufficient evidence to demonstrate that Defendants continue to maintain an open dump and continue to engage in open dumping - activities not addressed by any agency action. Given the Congressional and regulatory findings that open dumping is "particularly harmful to health," 42 U.S.C. § 6901(b), and poses "a reasonable probability of adverse effects on health or the environment," 40 CFR § 257.3, Defendants' ongoing violation of RCRA's open dumping prohibition, alone, presents strong evidence of irreparable harm and warrants application of the *per se* rule.

However, Plaintiffs have also alleged and provided significant evidence that Defendants are

18 Pltfs' Verified Complaint, ¶¶ 117, 118, 134, 137, 138, 141, 146, 168 (a)-(d).
19 *See* **Plaintiffs' Exhibits C, K, O, S, U, X, Y, Z** attached to Plaintiffs' Motion for Preliminary Injunction.
20 Defs' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction at 8.
21 *Id.* at 10.

operating a solid waste processing facility and/or a solid waste disposal facility without a solid waste processing facility permit and/or solid waste disposal facility permit.[22] Defendants acknowledge in their response brief that "the 'per se' rule has been used [in Indiana] to enjoin activity that is clearly unlawful and against the public interest.[23]" Defendants would like to ignore the fact, however, that the "per se" rule has been used in Indiana to enjoin the exact violation alleged in this case, i.e. operating a solid waste facility without a proper permit. Indeed, the Indiana Appellate Court in *National Salvage & Service Corp. v. Commissioner of Indiana Dept. of Environmental Management,* relied on the "per se" rule to affirm the grant of a preliminary injunction enjoining National Salvage's operations explaining:

> A facility without a [solid waste processing] permit poses an imminent and substantial endangerment to the health and welfare of the people in the area. Failure by such a facility to obtain a permit, therefore, is a situation in which no adequate remedy at law exists. Even if IC 13-7-12-2 is not interpreted as authorizing an injunction, in this case injunctive relief would be allowed without proof or findings that no adequate remedy at law exists *because the protection of the public welfare is involved.*
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> 571 N.E.2d 548, 559 (Ind.App. 1991) (emphasis added).

The court's ruling in *National Salvage* is on point and controlling here. Cases relied on by Defendants[24] merely provide additional authority for the propriety of applying the "per se" rule to enjoin Defendants' illegal solid waste operations that have for years inflicted horrific living conditions and caused incredible suffering for those living in the surrounding community.

IV. Defendants' Solid Waste Activities Continue to Cause Irreparable Harm in Fact

Disregarding the "per se" rule, Defendants contend that Plaintiffs cannot demonstrate that they will be irreparably harmed by Defendants' continued solid waste operations because Plaintiffs' allegations of harm "are speculative and not supported by credible, relevant scientific evidence.[25]" In

22 Plaintiffs' Verified Complaint at ¶ 168 (g)-(q); and **Plaintiffs' Exhibits J, O, Q, S, U, X, Y** attached to Plaintiffs' Motion for Preliminary Injunction

23 Defs' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction at 10.

24 *Id.* at 11 (discussing *L.E. Services v. State Lottery Commission,* 646 N.E.2d 334, 338 (Ind.App. 1995) ("per se" rule relied on to issue preliminary injunction to enjoin business that was violating state gambling laws from selling lottery tickets) and *Common Council of City of Peru v. Peru Daily Tribune, Inc.,* 440 N.E.2d 726, 728 (Ind.App 1982) ("per se" rule relied on to enjoin city council from violating Open Door law)).

25 *Id.* at 12.

support, Defendants attempt to impugn the Affidavit of Dr. Mark Chernaik, a biochemist and environmental toxicologist, and wholly ignore the substantial body of evidence, going back to 1995, demonstrating that hundreds of individuals who live or have lived in close proximity to each of Defendants' operations in Goshen, Elkhart and, more recently, Warsaw, all complain of the exact same untenable living conditions and health symptoms that they had never before experienced before Defendants began operations in their neighborhoods. This evidence, aside from Dr. Chernaik's opinions, provide sufficient evidence of irreparable harm that Defendants' solid waste activities continue to impose on Plaintiffs in this case. Nevertheless, Dr. Chernaik's Affidavit provides additional evidence and Defendants' criticisms of Dr. Chernaik's opinions are without merit.

Critical of Dr. Chernaik's opinion that the processing and grinding of "B" waste outdoors releases air pollutants hazardous to human health, the Defendants unbelievably assert that "Plaintiffs have introduced no evidence that VIM is currently processing and grinding "B" waste outdoors.[26]" This assertion is disingenuous at best considering the terms of Defendants' air permit, the limits of which are based on Defendants' application and description of their own operations to include the outdoor grinding of "B" waste.[27] As noted by Dr. Chernaik, air emissions calculations contained in the air permit's Technical Support Document estimates that Defendants' outdoor wood grinder (the Mobark) emits more than 38 tons of particulate matter per year.[28] Particulate matter is an air pollutant that has been deemed by U.S. EPA to be hazardous to human health which is the very reason it is listed as a criteria pollutant and regulated under the Clean Air Act.[29]

As to Dr. Chernaik's opinion that Defendants' open dumping of "B" waste may allow the

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26 *Id.* at 12-13, FN 28.

27 **Defendants' Exh. G** in support of Defendants' Amended Motion to Dismiss including Title V Operating Permit No. 039-24536-00538 issued to VIM Recycling.

28 **Defendants' Exh. G** in support of thier Amended Motion to Dismiss: Affidavit of Dr. Mark Chernaik, p. 10, submitted by Petitioners to the OEA in Cause No. 09-A-J-4257.

29 **Plaintiffs' Exh. W** attached to Plaintiffs' Motion for Preliminary Injunction: Affidavit of Dr. Mark Chernaik, p. 3-4, FN 3.

infiltration into groundwater of certain toxins including cadmium, arsenic and lead,[30] Defendants argue that to establish irreparable harm, Dr. Chernaik must also demonstrate that Plaintiffs will actually be exposed to the contaminated groundwater.[31] This is simply not the burden that Plaintiffs must meet. Rather, under 42 U.S.C. § 6972(a)(1)(B), Plaintiffs' must prove that Defendants have "contributed to or [are] contributing to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste; and . . . that the solid or hazardous waste *may* present an imminent and substantial endangerment to health or the environment." *Cox v. City of Dallas,* 256 F.3d 281, 292 (5th Cir. 2001) (emphasis added). The term "endangerment" means a threatened or potential harm, and does not require proof of actual harm. *Meghrig v. KFC Western, Inc.,* 516 U.S. 479, 486 (1996) (noting that "there must be a threat which is present now, although the impact of the threat may not be felt until later"). Contamination of groundwater is notoriously difficult to remediate and is an irreparable harm that Plaintifs are entitled to enjoin even if they may not actually be exposed to such groundwater. *See O'Leary v. Moyer's Landfill King County,* 523 F.Supp 642 (E.D. Pa. 1981) (landfill owner permanently enjoined from allowing leachate to escape the boundaries of landfill despite no evidence of actual exposure or harm).

Impugning Dr. Chernaik's opinion that Plaintiffs have been and will continue to be harmed from emissions including VOCs from Defendants' smoldering waste piles,[32] Defendants argue that irreparable harm is not demonstrated because Dr. Chernaik has not "quantitatively evaluated the level of emissions" to which Plaintiffs have been exposed.[33] Such an analysis is not necessary for Dr. Chernaik's opinion given that it relies on the years of photographic evidence of heavy smoke leaving Defendants' property, coupled with extensive testimony from more than 160 Plaintiffs and other witnesses about how exposure to this smoke has and continues to disrupt their lives and impact their

30 Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction at 13, FN 29.
31 *Id.*
32 **Plaintiffs' Exh. W** attached to Plaintiffs' Motion for Preliminary Injunction: Affidavit of Dr. Mark Chernaik, p. 5-9.
33 Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction at 13.

health.[34] Defendants' assertion that Dr. Chernaik has not evaluated other facilities in the area to see if they could possibly be the source of harmful air emissions is not true. Indeed, Dr. Chernaik testified previously that he closely examined recent, high-resolution satellite imagery of the site and the location of plaintiffs' residences and concluded that Defendants' Elkhart facility is so proximately located to Plaintiffs' residences that it is the only single facility with substantial potential to impact plaintiffs' air quality.[35]

Defendants criticize Dr. Chernaik for not looking at whether there are "any methodologies to confirm whether someone has been exposed to VOC/formaldehyde emissions.[36]" However, as Dr. Chernaik will testify, there are no methodologies to confirm such an exposure and this is true for many toxic substances. For example, there is no methodology to confirm exposure to Phenacyl chloride - the active ingredient in tear gas - but no one would require a methodology to confirm exposure to phenacyl chloride as a prerequisite to enjoining its release into the environment.

Defendants contend that Dr. Chernaik's opinions are flawed because "he did not evaluate the prevailing wind direction in the area - a factor in explosure analysis.[37]" However, Dr. Chernaik further explained in his prior testimony that Plaintiffs' residences are located in several directions from Defendants' facility and the highest levels of exposure will occur during stagnant air conditions such that the prevailing wind direction in the area is not a factor in an exposure analysis in this case.[38] Finally, Defendants attempt to confuse Dr. Chernaik's opinions regarding differing harms from removal

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34 *E.g.* **Plaintiffs' Exh. T** attached to Plaintiffs' Motion for Preliminary Injunction: U.S. EPA Notice of Violation (May 8, 2009)(finding that "air in the neighborhood directly downwind of the VIM site smelled of acrid smoke"); *see also e.g.,* **Plaintiffs' Exh. R** attached to Plaintiffs' Motion for Preliminary Injunction: Email of Rick Roudebush (Mar. 20, 2009) (while at the site IDEM inspector reported experiencing a severe headache and burning sensations in his eyes, nose and throat that lasted about 48 hours before dissipating).

35 **Defendants' Exhibit D** attached to Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction: Transcript of June 23, 2009, Telephonic Deposition of Dr. Chernaik, p. 23; *See also* **Plaintiffs' Exhibit 2:** Satellite Image of VIM Elkhart facility evaluated by Dr. Chernaik.

36 Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction at 13-14.

37 *Id*.

38 **Defendants' Exhibit D** attached to Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction: Transcript of June 23, 2009, Telephonic Deposition of Dr. Chernaik, p. 78-79.

of the smoldering "C" wastes, and the use of water for dust suppression or rain on the "B" waste leading to the release of hydrogen sulfide gas, by urging that "Dr. Chernaik seems to be opining that whatever VIM does, it will lead to emissions so it is unclear what Plaintiffs really are requesting that VIM do.[39]" Dr. Chernaik's testimony regarding what Defendants should have done to safely remove the "C" waste has absolutely no bearing on what Defendants should do now to prevent environmental impacts from open dumping and processing "B" wastes at the VIM facility. The fact that Defendants should have used "copious amounts of water" in removing the "C: waste (as a dust suppression measure) is not inconsistent with the fact that VIM should not open dump "B" waste because when "B" waste gets wet, sulfides are generated that will leach from the "B" waste piles into bare ground.

Despite Defendants' attempts to confuse, Plaintiffs' are seeking a preliminary injunction under RCRA, not their state tort law claims. Thus, the higher burden of causation for tort liability does not apply here. Moreover, this Court is reminded that, "environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e. irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Village of Gambell,* 480 U.S. 531, 545 (1987). The primary purpose of RCRA is to eliminate solid waste practices including open dumping deemed "particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land." 42 U.S.C. § 6901(b). Therefore, the evidence of Defendants' violations of RCRA favor the issuance of an injunction to protect public health and the environment notwithstanding the evidence reviewed by Dr. Chernaik and submitted with Plaintiffs' Motion for Preliminary Injunction which more than demonstrates the irreparable harm Defendants operations have inflicted and will continue to inflict on Plaintiffs' persons and properties if not enjoined by this Court.

39 Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction at 14.

CONCLUSION

Despite Defendant Ken Will's "wish" to recycle solid wastes at Defendants' Elkhart facility,[40] the overwhelming evidence demonstrates that he has never done so and, instead, has been illegally processing and open dumping solid wastes at the facility for years. The law and evidence presented by Plaintiffs in their Motion for Preliminary Injunction, Brief in Response to Defendants' Amended Motion to Dismiss and this Reply Brief demonstrate that Plaintiffs are likely to succeed on the merits of their claims. Plaintiffs will be irreparably harmed if Defendants' operations are not enjoined. Conversely, Defendants will not be harmed and the public interest will be served by putting an end to the many years of suffering endured by members of the surrounding community, including Plaintiffs from Defendants' illegal solid waste activities. For all of these reasons, Plaintiffs' Motion for a Preliminary Injunction should be granted.

Respectfully submitted,

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40 *Id.* at 15.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 19th day of February, 2010, the foregoing and all exhibits referenced therein were filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system:

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